

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JASON U.,

Claimant,

and

THE REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. L2005100804

DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Santa Ana, California, on January 25, 2006.

David Burkenroad, Attorney at Law, and Brian Allen, Consumer Advocate, represented claimant Jason U., who was not present at the fair hearing. Lora L., claimant's mother, was present throughout the fair hearing.

Mary Kavli, Program Manager, Fair Hearings, represented the Regional Center of Orange County, the service agency.

On January 25, 2006, the matter was submitted.

ISSUES

Should the service agency provide claimant with a functional assessment and a behavioral intervention plan in accordance with any such assessment?

Is the prevailing party in this proceeding entitled to attorney's fees?

Who is the prevailing party?

FACTUAL FINDINGS

The Regional Center of Orange County, Functional Assessments And the Implementation of Behavioral Intervention Plans

1. The Regional Center of Orange County (the RCOC) provides a variety of services and supports to developmentally disabled consumers living within its catchment under the Lanterman Act. The SDRC provides consumers with psychological assessments, including functional assessments (also known as applied behavioral assessments or ABAs), when necessary, to determine what services and supports best meet a developmentally disabled consumer's unique needs.

Service coordinators are assigned by the RCOC to individual consumers. These service coordinators meet with the consumers, their parents, representatives, clinicians, vendors and others to determine what regional center services and supports best meet the consumer's needs. A service coordinator prepares an Individual Program Plan (IPP) for each consumer, which is reviewed at least annually.

RCOC service coordinators are not authorized to provide a consumer with a behavioral intervention plan. If a behavioral intervention plan is requested or indicated, the RCOC service coordinator has the consumer or the consumer's parent(s)/representative(s) complete a behavioral intervention checklist and questionnaire, which is delivered to the RCOC's Behavioral Services Resource Group for review.

The Behavioral Services Resource Group is a team of specialists with expertise in the field of developmental disabilities, including a licensed psychologist. The team reviews information about a consumer and determines whether the information requires further assessment. If so, an appropriate assessment is conducted, after which the team reviews the results to determine what kind of behavioral intervention plan, if any, should be provided to the consumer.

2. A functional assessment differs from a standard psychological assessment in that a functional assessment is typically administered to young children whose disabilities exceed those of high functioning developmentally disabled person and who have engaged in fairly severe behavioral problems. A behavioral intervention plan resulting from a functional analysis is very intensive and is typically provided in a controlled, restricted environment. A behavioral intervention plan is designed to permit the consumer to recognize the relationship between antecedent conduct and adverse personal and social consequences and to help the consumer to minimize maladaptive behaviors.¹

¹ Functional assessments and the behavior intervention plans arising out of those assessments are typically found in an educational setting following the suspension of a disabled student from school for a period exceeding ten days.

Under federal law, in determining whether to order a change in school placement, a school may consider any unique circumstances on a case by case basis and may suspend a disabled student for not more than 10 school

Claimant's Status

3. Jason U. (claimant) was born on March 3, 1988. He has lived in Southern California his entire life. Claimant receives regional center services and supports under a qualifying diagnosis of mild mental retardation.

Claimant currently lives with his mother in Placentia. His father lives in Long Beach. Claimant has received special education services since the first grade. He currently attends Valencia High School, where he is a senior.

Claimant was described by his mother as being high functioning, but academically challenged. He is fluent in English and Spanish. Claimant likes to use his hands and he likes to use tools. He enjoys dancing, music and art. Claimant is comfortable with other persons, particularly males younger than himself, and he treats most others with respect.

Claimant has a rich fantasy life. He wears security guard clothing when he is at home, carries a flashlight, tells others he frequently goes “clubbing” at local nightclubs, and claims he is skilled in surfing the Internet. These flights of imagination are harmless and do not involve fantasies of violence.

Claimant travels with others in the community, but he is unable to take public transportation by himself. He attends to most of his personal hygiene needs, but he resists brushing his teeth. Claimant has some money skills, but he cannot make change. He has never held any employment.

4. Claimant detests school and is frequently truant. Claimant and his mother have constant disputes about this and several other matters. Claimant dislikes his mother's

days. A child with a disability who is removed from current placement for a period exceeding 10 days must receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, designed to address the behavior violation so that it does not recur. 20 U.S.C. § 1414, (k)(1).

California Code of Regulations, title 5, section 3001 provides in part:

(f) ‘Behavioral intervention plan’ is a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual’s IEP. The ‘behavioral intervention plan’ shall become part of the IEP. The plan shall describe the frequency of the consultation to be provided by the behavioral intervention case manager to the staff members and parents who are responsible for implementing the plan. A copy of the plan shall be provided to the person or agency responsible for implementation in noneducational settings. The plan shall include the following:

(1) a summary of relevant and determinative information gathered from a functional analysis assessment . . . ”

Under California Code of Regulations, title 5, section 3052, subdivision (c), upon the completion of the functional analysis assessment, an IEP team meeting must to review results and, if necessary, to develop a behavioral intervention plan.

constant prompting, which is necessary to keep him on task. While claimant has not physically assaulted his mother in two years, he often threatens to do so which makes her very uncomfortable. Despite their disagreements and difficulties, claimant and his mother are very close and have a loving relationship.

5. About two years ago, claimant refused to disconnect from the home computer when his mother asked him to do so. The argument escalated and his mother “may have gone after him with a belt.” Claimant ran into his room and closed the door. His mother opened the door. Claimant pulled his mother’s hair and struck her in the face with his fists.

The mother called 911 and the police responded. Claimant was arrested for battery and taken into custody, where he remained for several days. Claimant was released to his father’s care, where he remained for a couple of weeks. Ultimately, claimant was reunited with his mother and he has stayed with her since then.

As a condition of his juvenile probation, claimant and his mother met with a psychologist once every two weeks for a year. Claimant established rapport with his counselor and, according to his mother, counseling was of benefit in the areas of attending school and respecting his mother. Claimant’s mother testified, “We gained some ground.” Claimant stopped going to counseling about a year ago (other than as described later) and some progress was lost. The relationship between claimant and his mother worsened.

6. Claimant’s mother really had no idea of what a functional assessment, an applied behavioral assessment or an ABA involved. In very general terms, she described it as “an assessment of behavior which might result in a solution to [claimant’s] moody and strange behavior.” Claimant’s mother never spoke with a licensed health care professional about claimant’s need for a functional assessment. The only person who suggested that claimant might benefit from a functional assessment was Brian Allen, claimant’s advocate.

Absolutely no evidence was offered to establish claimant needed or would benefit from a functional assessment. All the credible evidence was to the contrary.

7. Claimant’s mother would like claimant to stop threatening her, gain the skills necessary to hold some type of employment, and become better socialized.

Mary K. Parpal, Ph.D.

8. Mary K. Parpal, Ph.D. (Dr. Parpal) received her doctorate in psychology from Stanford University in 1986. After she received her doctorate, she was employed as a licensed clinical psychologist in Washington, D.C. In 1991, Dr. Parpal moved to California and began practicing clinical psychology in a private setting. For the past ten years, Dr. Parpal has provided services in the area of clinical psychology to the RCOC. She is a member of the RCOC’s Behavioral Services Research Group. She specializes in the assessment and treatment of children and adults with pervasive developmental disorders.

9. Dr. Parpal has been aware of claimant since November 2005, when his case was presented to the behavioral research team. Dr. Parpal reviewed claimant's chart, IPP and the case worker's notes. She was asked to observe claimant in his home.

Dr. Parpal visited the family home on January 23, 2006. Before the visit, Dr. Parpal reviewed claimant's chart. Claimant, his mother, the case worker and Dr. Parpal were all present throughout that hour and a half visit.

Claimant had not attended school that day, which was consistent with his history of truancy. He had just starting psychological counseling, which was being provided through the Orange County Mental Health Department. During the visit, claimant took his mother's cellular telephone and refused to return it to her when his mother asked him to do so; however, he returned it to his mother when Dr. Parpal asked him to do so. Claimant did not threaten his mother during the visit. He did not block the door to prevent anyone from leaving the home during the visit.

Dr. Parpal found claimant to be a delightful, high functioning developmentally disabled young man who knew he was different from his peers who appeared to be depressed. Dr. Parpal described claimant as having an involved but essentially harmless fantasy life, as not being academically skilled individual, but nevertheless likely to do well in a vocational setting. Claimant's mother was, according to Dr. Parpal, "a great advocate."

10. Based on her education, training, experience, review of pertinent materials and assessment of claimant in the home, Dr. Parpal concluded traditional psychological counseling had proven beneficial to claimant in the past, not continuing psychological counseling had resulted in some regression, claimant's depression and other emotional problems would benefit from reinstituting psychological counseling, claimant's emotional and behavioral problems would not be appropriately addressed by a highly structured behavioral intervention plan because that kind of plan is not suitable for persons claimant's age who high functioning and because it is highly restrictive. Dr. Parpal testified there was no need for a functional assessment.

Claimant's IPP

11. Claimant receives regional center services and supports under an Individualized Program Plan (IPP).² The IPP dated March 28, 2005, noted that claimant had

²

Welfare and Institutions Code section 4512, subdivision (b) requires:

"The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan."

undergone a mental assessment in 2003 by Western Youth Services, that he and his mother received counseling twice a month which ended in 2004, and the RCOC had provided his mother with intervention workshops. The IPP stated, “A Behavior Intervention Class Schedule was given to mom, if she feels the need to attend the behavior classes again.”

12. In early October 2005, Allen, claimant’s advocate, requested the RCOC schedule another IPP meeting to review claimant’s progress and to update the IPP. A meeting was held on October 26, 2005, in response to that request. Claimant, his mother, Allen, and Vanny Chheng (Chheng), claimant’s RCOC service coordinator, attended the October 26 meeting.

13. At the October 26 meeting, Allen provided Chheng with a one page document Allen had prepared which Allen and the mother had signed. That document stated under the “request and recommendation” section:

“2) Complete a comprehensive Intensive Applied Behavior Assessment Analysis on Jason. Based on the fact Jason has unique emotional needs, grief within the home and school, and resitants [sic] within the family home.”

The following handwritten comment was set forth following that typewritten statement:

“Direct intervention within a month.”

The one page typewritten document also stated:

“4) Provide a Referral and services for Psychological Counseling Based on the fact Jason is exhibiting unique emotional needs and grief and resitants [sic] within the home and community and/or public.”

14. Chheng did not sign that document. She told Allen and claimant’s mother she would communicate their requests to the RCOC’s Behavioral Services Research Group. Chheng wrote the following note on a copy of the IPP dated March 28, 2005.

“On 10-26-05 met w/parent, Jason, Brian Allen, family advocate, to discuss the in-home behavior interventions services for Jason. 582 forms given to parent to complete and return to SC. When the forms complete, SC to present this request to BSRG for consideration.”

It was not established that either the mother or Allen actually saw the note Chheng wrote on the IPP. But, Chheng *never* represented to either the mother or Allen that the RCOC would provide claimant with a functional analysis and/or a behavioral intervention plan. Chheng did *not* have the authority to make such a promise, and she was very careful to be sure she did not make any promises she could not keep.

15. Chheng's typewritten notes concerning the October 26, 2005, meeting did *not* contain any statement to the effect that the RCOC would provide claimant with a functional assessment or a behavioral intervention. To the contrary, the notes indicated the mother's request would be presented to the Behavioral Services Research Group

16. On November 2, 2005, a week after the meeting, Chheng wrote a letter to claimant's mother, a copy of which was sent to Allen.

Chheng's letter confirmed their prior request for "a comprehensive Intensive Applied Behavior Assessment Analysis" and confirmed that she had previously explained to them that their request "would be presented to the RCOC Behavioral Services Resource Group (BSRHG) for review and consideration" and "a recommendation would be made by RCOC specialists" and a "decision would be made as to what services would be authorized."

17. An "IPP Addendum" was received in evidence. That addendum was signed by claimant's mother, Chheng and Allen. It stated claimant's mother and Chheng "agree with this Individual Program Plan in its entirety" except for "Item 4." Attached to the addendum was the document prepared by Allen (which is referred to in Factual Finding 13). At the bottom of the addendum was the following statement, which was written by Chheng:

"SC will type the IPP addendum then fax it to Mr. Allen and parent for reviewing."

The IPP addendum did *not* expressly incorporate the document prepared by Allen which contained the requests for services.

The Dispute

18. Claimant contends the RCOC failed to fulfill its responsibility to claimant by refusing to complete a functional assessment within thirty days of the October 26, 2005, meeting, which was claimed to constitute a breach of claimant's "agreed" October 26, 2005, IPP. Claimant seeks an order requiring the RCOC to provide claimant with a functional assessment. Claimant also seeks a finding that he is the prevailing party in this action so claimant's attorney and advocate can recover attorney's fees.

Claimant asserts the right to attorney's fees under a contractual provision set forth on the reverse side of a vendor's purchase order form and under Civil Code section 1717.

19. The RCOC argues claimant, through his attorney and advocate, either negligently misunderstood or intentionally misrepresented what Chheng, claimant's mother and Allen had agreed to on October 26, 2006. The RCOC claims there is no general right to an award of attorney's fees in a Lanterman Act proceeding and there is no right to recover attorney's fees in this matter on a contractual basis because there was no contract between the RCOC and claimant or his mother.

Additional Factual Findings

20. The RCOC issues purchase orders which contain on their reverse side various contractual provisions. Provision 13, entitled “General Provisions,” provides in part:

“a. **Attorney Fees:** If any suit is brought because of an alleged dispute, breach, default or misrepresentation *in connection with any provision of this Purchase Order*, the prevailing party or parties in such suit shall be entitled to recover from the other party or parties reasonable attorney’s fees and other costs incurred in that suit, in addition to any other relief to which they may be permitted.” (Emphasis added.)

21. There was no purchase order or other written contract between the RCOC and claimant, his mother or claimant’s representatives. No contractual basis exists by which to award attorney’s fees.

LEGAL CONCLUSIONS

The Lanterman Act

1. In 1977, the California Legislature enacted the Lanterman Developmental Disabilities Services Act (the Lanterman Act) “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” See, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.

Under the Lanterman Act, the “State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge.” Welfare and Institutions Code section 4501.

California recognizes “[p]ersons with developmental disabilities have the same legal rights and responsibilities [as those] guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California.” Welfare and Institutions Code section 4502.

Statutory rights include a “right to treatment and habilitation services and supports in the least restrictive environment.” Welfare and Institutions Code sections 4502, subdivision (a), 4620, 4646-4648; see also, *Association for Retarded Citizens v. Department of Developmental Services*, supra, 38 Cal.3d at p. 389.

2. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as:

“[A] disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

3. Welfare and Institutions Code section 4512, subdivision (b) defines “services and supports” as:

“[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. *The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . .* Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.” (Emphasis added.)

4. The Department of Developmental Disabilities (the DDS), a public agency, is responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities. Welfare and Institutions Code section 4416.

The DDS contracts with private non-profit community agencies called “regional centers” to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” Welfare and Institutions Code section 4620.

The DDS promotes uniformity and cost-effectiveness in the operation of regional centers, but the DDS’ responsibility “does not extend to the control of the manner in which [regional centers] provide services or in general operate their programs.” See, *Association for Retarded Citizens v. Department of Developmental Services*, supra, at pp. 389-390.

5. The Lanterman Act establishes a regional center’s responsibilities to its consumers. See, Welfare and Institutions Code sections 4640-4659.

A regional center must develop and implement an IPP for each consumer which specifies the consumer's needs for services and supports. These services and supports appear in statements of goals and in specific time-limited objectives set forth in the IPP. Under the Lanterman Act, both goals and objectives "shall be stated in terms that allow measurement of progress or monitoring of service delivery." Welfare and Institutions Code section 4646.5, subdivision (a)(2).

The IPP must be reviewed, reevaluated and modified no less than every three years by a planning team composed of regional center staff, the consumer, and where appropriate, the consumer's parents, to ascertain whether the planned services have been provided and the objectives have been fulfilled within the time specified in the IPP. Welfare and Institutions Code section 4646.5, subdivision (b).

6. Welfare and Institutions Code section 4648 states in part:

"In order to achieve the stated objectives of a consumer's individualized program plan, the regional center shall conduct activities including, but not limited to all of the following:

(a) Securing *needed* services and supports . . .

(1) It is the intent of the legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. *The regional center shall secure services and supports that meet the needs of the consumer, as determined by the consumer's individual program plan.*

(2) . . . Services and supports shall be flexible and individually tailored to the consumer . . . "

7. Welfare and Institutions Code section 4646, subdivision (d) provides:

"Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan . . . shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting." (Emphasis added.)

*Application of the Lanterman Act
to the Dispute between Claimant and the RCOC*

8. The Lanterman Act required the RCOC to take into consideration claimant's parent's preferences. The fact that claimant's mother was interested in claimant obtaining a functional assessment and in implementing a behavioral modification plan, and the fact that

she discussed those matters with the service coordinator, did not mean they were necessary services or require them to be provided. The RCOC service coordinator specifically stated she would refer the request to a behavioral group who had authority to make a decision. The service coordinator's statements to Allen and claimant's mother were confirmed in writing at least twice. She promised nothing else. Claimant, through his attorney and advocate, now claim that the written request for a functional assessment and a behavioral modification plan (which was attached to a document identified by Allen as IPP Addendum") became binding on the RCOC and required the delivery of the requested services. In fact, the face of the IPP Addendum specifically stated "SC will type the IPP addendum then fax it to Mr. Allen and parent for reviewing." That notation was wholly consistent with the service coordinator's reasonable understanding that the attachment did not set forth a final IPP, and inconsistent with the position taken by claimant at this hearing.

Beyond that, no evidence supported claimant's need for a functional assessment or the implementation a behavioral modification program. No lay testimony supported any need. The credible expert testimony of Dr. Parpal established there was no need for a functional assessment on and before the hearing, that traditional psychological counseling (which is being provided) was indicated, and implementing a behavioral modification program was contraindicated.

This conclusion is based on Factual Findings 1-17 and Legal Conclusions 1-7.

Attorney's Fees

9. "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation . . . is left to the agreement, express or implied, of the parties." Code of Civil Procedure section 1021. The rule codified in Code of Civil Procedure section 1021 is frequently restated and applied. See, for example, See *Grasso v. Crow* (1997) 57 Cal.App.4th 847, 851.

There are several exceptions to the general rule, which include: (1) where attorney's fees are specifically provided by statute; (2) where attorney's fees are specifically provided by contract; and, (3) where a plaintiff in an equitable action recovers or preserves a common fund, or obtains benefits for himself and others.

The Lanterman Act does *not* provide for the recovery of attorney's fees. *No* contract or purchase order containing an attorney's fees clause exists in this matter. Civil Code 1717 applies *only* to an action on a contract where the contract specifically provides for an award of attorney's fees to the prevailing party. It was *not* established that claimant's request for a fair hearing in this matter constituted an equitable action to recover or preserve a common fund.

10. There is no right to attorney's fees in this Lanterman Act proceeding.

This conclusion is based on Factual Findings 1-17 and 20-21 and on Legal Conclusions 1-9 and 11-12.

Prevailing Party

11. “Prevailing party” is a term used to identify the most successful party in a legal action. A trial judge has wide discretion in determining who is the prevailing party. *Hunt v. Fahnestock* (1990) 220 Cal.App.3d 628, 633. Thus, in *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 402, the party prevailing on the most significant claim was properly identified as the prevailing party.

12. The RCOC was the prevailing party on every significant issue in this matter. Claimant’s attorney and his advocate brought this matter to hearing without any expert testimony to support the contention that claimant was entitled to receive a functional assessment and a behavioral modification plan from the RCOC. The quality of the evidence offered to support the claim was contrived, to the point of being frivolous. It appeared the sole purpose of the hearing was to generate attorney’s fees and to harass the RCOC.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

Claimant’s appeal from the Service Agency’s determination to refuse to provide claimant with a functional assessment and a behavioral modification program is denied.

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

Dated: February 2, 2006

James Ahler
Administrative Law Judge
Office of Administrative Hearings